DATO' MAHINDAR SINGH S/O HARCHARAN SINGH

v.

MAJLIS PEGUAM

HIGH COURT MALAYA, KUANTAN
DATO' ARIFIN ZAKARIA J
[ORIGINATING SUMMONS NO. 24-278 OF 1994]
28 JANUARY 1995

LEGAL PROFESSION: *Sijil Annual - Issuance - Whether a matter of the defendant's discretion - Plaintiff convicted of a criminal offence - Whether a ground for refusing to issue certificate - Refusal by defendant to issue certificate - Whether tantamount to usurping the powers of the Disciplinary Board - Legal Profession Act 1976 ss. 29, 32, 93 & 94.*

LEGAL PROFESSION: *Sijil Annual - Application form used materially different from prescribed form - Effect - Part of form that differed from prescribed form - Whether could be ignored - Advocates and Solicitors (Issue of Sijil Annual) Rules 1978 - Schedule thereto.*

The plaintiff, an advocate and solictor, was convicted of an offence of criminal intimidation under s. 5 of the Abduction and Criminal Intimidation of Witnesses Act 1947. On 14 October 1994, in compliance with s. 29 of the Legal Profession Act 1976 (the Act), and while his said conviction was pending appeal in the High Court, the plaintiff applied to the defendant for his Sijil Annual in respect of his practice year 1995. The defendant, in the purported exercise of a discretion allegedly given them by s. 32 of the Act, refused to issue the said certificate, and wrote to the plaintiff stating:

> With regard to the position of your Sijil Annual, the Bar Council has, at its meeting held on 17 December 1994 decided not to issue you with the Sijil Annual and to proceed under s. 88A of the Legal Profession Act 1976 in view of your conviction for intimidation

It was the defendant's view that by reason of his said conviction, the plaintiff was not a fit and proper person to be issued with the certificate. The plaintiff applied for a declaration that it was wrong in law for the defendant to refuse him the certificate, and that the defendant, in any case, was under a duty to issue the said certificate, particularly so when all the requirements of s. 32 of the Act had been complied with.

Held:

[1] The application form for the Sijil Annual being used currently by the defendant is different both in form and content from the form prescribed in the Schedule to the Advocates and Solicitors (Issue of Sijil Annual) Rules 1978. The "declaration b" added to the new form, clearly, does not appear in the prescribed form. In these circumstances a member may choose to ignore any part of the form which in substance is different from the prescribed form. It follows therefore that the the failure of the plaintiff to state or declare his conviction as required by the so called "declaration b" could not be a valid premise to reject the plaintiff's application.

[2] The disciplinary powers in relation to an advocate and solicitor lies with the Disciplinary Board established under s. 93 of the Act. Section 94(2) of the Act gives the said Board the power to strike off the Roll or suspend from practice any advocate and solicitor who had been found guilty of misconduct. The plaintiff's conviction herein may well be within the term "misconduct", and hence, it is for the Board to determine whether or not to take disciplinary action against the plaintiff. By refusing to issue the Sijil Annual to the plaintiff, on the ground of his conviction for a criminal offence, it would tantamount to the defendant

usurping the power which is expressly conferred upon the Board by the Act. It follows that the defendant had miscontrued s. 32 in coming to the conclusion that it could, in the exercise of its discretion under that section, refuse to issue to the plaintiff the said Sijil Annual, even when there was due compliance with the provisions of that section.

[Application allowed. Defendant directed to issue the Sijil Annual].

Case referred to:
Yip Shou Shan v. Majlis Peguam [1994] 2 AMR 34 ***(dist)***

Legislation referred to:
Legal Profession Act 1976 ss. 29, 32, 34, 88A, 93, 94(2) & 94(3)
Abduction and Criminal Intimidation of Witnesses Act, 1947 s. 5
Solicitor's Account Rules 1978
Solicitors (Issue of Sijil Annual) Rules, 1978

For the plaintiff - Jadjit Singh; M/s. Jadjit Singh & Co.
For the defendant - M/s. Zain & Co.

JUDGMENT

Arifin Zakaria J:

The plaintiff herein is a senior member of the Malaysian Bar practising under the name of Mahindar Singh & Co. He was called to the bar on the 23 January 1963 and had since pratised as an advocate and solicitor; a span of 32 years.

As provided under s. 29 of the Legal Profession Act 1976 (the Act) an advocate and solicitor practising in Malaysia is required to obtain in respect of each year a practising certificate. To obtain the said certificate an advocate and solicitor is required to furnish to the Registrar *inter alia*, a Sijil Annual (SA) which is issued by the defendant under s. 32 of the Act. By letter dated 14 October 1994, the plaintiff applied to the defendant for the said SA in respect of the year 1995. The defendant refused to issue the SA to the plaintiff. The reason for such refusal is disclosed in the defendant's letter dated 21 December 1994 (Exh. H).

On 14 November 1994, 9 days after the 21 day date line, as prescribed by s. 32 of the Act, the plaintiff received a reply from the defendant. The relevant part of the said letter (Exh. D) reads:

> To enable the Council to consider your application, it will be appreciated if you could please let us know the present status of your appeal in respect of the conviction for incrimination (sic).

The plaintiff *vide* letter dated 1 December 1994 replied to the said query giving details of the progress of his appeal against the order of conviction for an offence under s. 5 of the Abduction and Criminal Intimidation of Witnesses Act, 1947. The detail of which does not concern me here. Suffice for me to say that, after several adjournments, the appeal was set down for hearings on the 12th of this month, before the Temerluh High Court. I have been informed that the hearing did not go on as scheduled and no new date has been given for the hearing of the said appeal.

Then on 21 December 1994 the plaintiff received another letter from the defendant as per Exhibit "H" to the plaintiff's affidavit: the relevant part of which reads:

> With regard to the position of your Sijil Annual, the Bar Council has, at its meeting held on 17 December 1994 decided not to issue you with the Sijil Annual and to proceed under s. 88A of the Legal Profession Act, 1986 in view of your conviction for intimidation.

The plaintiff *vide* letter of 22 December 1994 (Exh. I) expressed his objection to the steps taken by the defendant under s. 88A of the Act and maintained that a conviction for an offence for intimidation does not come under the purview of the said section. The plaintiff also requested for confirmation by the defendant that should such application be made, it will be made *inter parte* so that he could appear and defend himself. He further gave notice to the defendant that he will be making an application under s. 34 of the Act. The defendant, in its letter of the even date, stated that the plaintiff's request will be referred to its solicitor who will then keep the plaintiff informed of the development.

The plaintiff then filed this application on the 28 December 1994 for an order that this Court directs the defendant to issue the SA to the plaintiff.

The grounds in support of the application are set out in the plaintiff's affidavit which may be summarised as follows:

(i) the plaintiff having complied with the requirements of s. 32 of the Act, it is mandatory for the defendant to issue the SA to the plaintiff;

(ii) there is no bar to the issuance of the SA to the plaintiff, since there is no rule to say that upon a conviction which is pending appeal the defendant can refuse the SA or act under s. 88A of the Act;

(iii) In view of the stay of execution order granted by the Court in respect of his sentence, the rejection of his application for SA is a contempt of the stay order, is unjust in law and in equity;

(iv) the defendant, having known the full facts of his criminal case and conviction, had since the said conviction until 1994 issued the SA to the plaintiff and by reason of the same the defendant is now estopped from refusing to issue the SA to the plaintiff in law and in fact;

(v) the defendant had acted *mala fide* in delaying in replying to the plaintiff's application;

(vi) the defendant failed to observe the rule of natural justice by not giving the plaintiff the rights of hearing before the Sijil Annual subcommittee and the defendant before they came to the sudden decision refusing the SA to the plaintiff.

I shall now deal with some of the grounds advanced by the plaintiff.

Section 32 of the Act

The relevant part of s. 32 of the Act provides as follows:

> 32. Issue of Sijil Annual
>
> (1) Subject to this section and ss. 33 and 34, the Bar Council shall at any time after the month of June in the preceding year issue a Sijil Annual to an advocate and solicitor within twenty one days of the receipt of an application under subsection (2) if:
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> (a) the Bar Council is satisfied that the application complies with that subsection and any rules made under this section,
>
> (b) the Bar Council is satisfied that the applicant is not prohibited from holding a practising certificate under s. 30;
>
> (c) the advocate and solicitor has delivered or is exempted from delivering an accountant's report in accordance with s. 79;

(d) the advocate and solicitor is not in arrears in respect of any contribution to the Compensation Fund, or of any subscription or levy lawfully due to the Bar Council or his State Bar Committee under this Act; and

(e) the advocate and solicitor intends to practise under an approved name.

(2) An application by an advocate and solicitor for a Sijil Annual shall be made in such form or forms as may be prescribed by and in accordance with rules made under this section and shall be accompanied by appropriate certificates showing that Subsection (1) (b) has been complied with.

The plaintiff's contention simply put is this: the plaintiff having complied with all the requirements of s. 32 of the Act, it is then imperative upon the defendant to issue the SA to the plaintiff. The defendant, on the contrary, holds the view that under s. 32 of the Act, it has a discretion whether to issue the SA or not. The defendant contended that the issuance of the SA is not a mere "rubber stamping process". In the exercise of its discretionary power the defendant, in the words of the Counsel for the defendant, "has to take into account public interest". He contended that it is the duty of the defendant, as entrusted by the legislature, to protect public interest and the interest of the profession as a whole. Heavy reliance is placed on what was said by Mohd Eusoff Chin SCJ (as he then was) in the case of *Yip Shou Shan v. Majlis Peguam* [1994] 2 AMR 34 1789 where at p. 1797 he said:

> We are of the view that s. 32 of the Act imposes a duty on the Bar Council to process and scrutinise every application for a Sijil Annual. It is the Bar Council's paramount duty to ensure that only an honest, trustworthy, fit and proper advocate and solicitor should be allowed to practise...
>
> ... it is, therefore, clearly misconceived to interpret the role of the Bar Council as merely a rubber-stamping process, it having no discretion to refuse to issue a Sijil Annual in circumstances where clearly it should not be issued in the public interest. To agree with appellant's argument would render s. 34 otiose in its application to s. 32, bearing in mind that s. 32 is subject to s. 34.

The defendant's Counsel in his submission further contended that, since the plaintiff had been convicted of the offence of intimidation by a Court of law, therefore, he is not a fit and proper person to practise; and to allow persons like the plaintiff to continue to practise would be contrary to public interest and the interest of the profession. In view of all that the defendant's Counsel said the defendant decided not to issue the SA to the plaintiff. The question for the determination of this Court is whether it is right in law for the defendant to do so in the circumstances of this case. The answer to this, I think will depend on the proper construction to be given to s. 32 of the Act. Counsel for the plaintiff claimed that there is no connection whatsoever between s. 32 and the conviction suffered by the plaintiff. Therefore, on that ground alone the decision in *Yip's* case should be distinguished from this case. Let me pause here, to consider what was the act or omission complained of in *Yip's* case. In that case, the appellant failed to submit to the Bar Council the accountant's report in accordance with the Solicitor's Account Rules 1978. In my opinion that falls squarely within the purview of para. (c) of sub-section (1) of s. 32 and, therefore, the refusal by the Bar Council to issue the SA to the appellant in that case was properly within provisions of the said section.

In the present case perhaps, para. (a) of s. 32 (1) may be relevant. The said paragraph stipulates that an application made under sub-section (2) should, to the satisfaction of the Bar Council, comply with that sub-section and any rules made under s. 32. The application form for the Sijil Annual is prescribed by the advocates and solicitors (Issue of Sijil Annual)

Rules 1978 (P.U. (A) 368/1978). (The Rules made under s. 32.) Therefore, it follows that any non-compliance with such form in whatever manner may render an application to be defective and the defendant may, in such circumstances, reject such application. In fact, in para. 11 of the affidavit of Catherine Eu, deposed on behalf of the defendant it is stated:

> 11. This discretion was exercised in the plaintiff's favour despite of this conviction. Disclosure of such convictions is now required pursuant to declaration (b) in the form of application for Sijil Annual.
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> (The said "declaration (b)" appears at the bottom of Ext. Bl.)

It is not disputed that the plaintiff had not disclosed both his conviction and particulars of his conviction as required by the said form. Thus, it may be argued that such omissions may amount to non compliance with the Rules made under s. 32. That may constitute sufficient ground for the defendant to refuse the plaintiff's application. However, upon close scrutiny of the form (Ext. BI) (which is currently used by the defendant) I find that it is different both in form and content from the form as prescribed in the Schedule to the Advocates and Solicitors (Issue of Sijil Annual) Rules 1978. The new form has, *inter alia*, added in the "declaration (b)" which states:

> And I hereby declare that I:
>
> (a) ...
>
> (b) have not been convicted in Malaysia or elsewhere of a criminal offence which render are unfit to be a member of my profession, and in particular but not limited to an offence involving fraud or dishonesty.

Such a declaration does not appear in the prescribed form. In those circumstances, I am of the considered view that a member may choose to ignore any part of the form which in substance is different from the prescribed form. I, therefore, rule that the failure on the part of the plaintiff to state or declare his conviction as required by the so called "declaration (b)" could not be a valid premise for the defendant to reject the plaintiff's application. If the defendant is desirous of inserting the said "declaration (b)" in the application form, what the defendant should do is to amend the prescribed form first and include therein the said declaration. This has not been done. How could it then require its members to make the necessary declaration. I don't think it is a proper thing to do.

With regard to para. (b), (c), (d) and (e) of the subsection (1) of s. 32, suffice for me to say that no suggestion was made by the defendant either through the affidavit in reply of Catherine Eu or in the submission of Counsel for the defendant that the plaintiff has failed to comply with any of those provisions. In the circumstances, I may safely, conclude that the plaintiff has duly complied with those provisions.

Further, I need to add that the disciplinary powers in relation to an advocate and solicitor now lie with the Disciplinary Board established under s. 93 of the Act. Section 94(2) of the Act gives the said Board the power to strike off the Roll or suspend from practice any advocate and solicitor who had been found guilty of misconduct. The term "misconduct" includes a conviction for criminal offence which makes an advocate and solicitor unfit to be a member of his profession (see s. 94(3)). The plaintiff's conviction may well be within the term "misconduct", hence, I think, it is for the Board to determine whether to take disciplinary action against the plaintiff or not. In my view, by refusing to issue the SA to the plaintiff, on the ground of his conviction for a criminal offence, it would tantamount to the defendant usurping the power which is expressly conferred upon the Board by the Act.

For the above reasons, I agree with the plaintiff's Counsel that the defendant had misconstrued s. 32 in coming to the conclusion that it could in the exercise of its discretion under that section refuse to issue to the plaintiff the SA in the circumstances of this case.

Section 88A of the Act

The defendant through the affidavit of Catherine Eu also referred to s. 88A in support of its action. Paragraph 22 of the said affidavit reads -

> 22. I have been advised by the solicitors of the defendant and verily believe that s. 88A sub-section (1) (e) is applicable to the present case...

Section 88A (1) (e) provides as follows:

> 88A. Suspension of advocate and solicitor.
>
> (1) where an advocate and solicitor:
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> (e) is otherwise incapable, from infirmity of body or mind or any other cause, of effectively performing the functions of an advocate and solicitor;
>
> and the Bar Council considers that it would be in the public interest or in the interest of his clients or of the profession that such an advocate and solicitor be suspended from practice, the Bar Council may apply by summons to the Chief Judge *ex parte* for an order suspending such advocate and solicitor from practice until further order.

From the above provisions, it is clear that the power to suspend an advocate and solicitor lies with the Chief Judge on the application of the defendant. So far the defendant has not taken any step in making such an application. Therefore, how could the defendant now claim that it is relying on s. 88A to support its case. I find no merit whatsoever in such claim by the defendant.

Conclusion

In view of what I have said above, I think, it is not necessary for me to go into other issues raised by the plaintiff in support of the his application. For the above reasons I allow the application by the plaintiff and accordingly direct that the defendant do issue to the plaintiff the SA as applied. On the question of costs, I order that the defendant pays the plaintiff's cost.